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Proposed Regulation Agency Background Document

Approving authority name	Department of Environmental Quality
Virginia Administrative Code (VAC) citation	9 VAC 25-260
Regulation title	Water Quality Standards
Action title	Amendment to the state's Antidegradation Policy by designating four tributaries to Simpson Creek as Exceptional State Waters.
Document preparation date	September 15, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The State Water Control Board (Board) is proposing amendments to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards Regulation to designate four surface waters for special protection as Exceptional State Waters.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

§ 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the Board to establish water quality standards and policies for any State waters consistent with the purpose and general policy of the State Water Control Law, and to modify, amend or cancel any such standards or policies established. The federal Clean Water Act at 303(c) mandates the State Water Control Board to review and, as appropriate, modify and adopt water quality standards. The corresponding federal water quality standards regulation at 40 CFR 131.6 describes the minimum requirements for water quality standards. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site

<http://www.epa.gov/epahome/cfr40.htm>

Clean Water Act web site

<http://www4.law.cornell.edu/uscode/33/1313.html>

State Water Control Law (Code of Virginia) web site

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

The EPA Water Quality Standards regulation (40 CFR 131.12) is the regulatory basis for the EPA requiring the states to establish within the antidegradation policy the Exceptional State Waters category and the eligibility decision criteria for these waters. EPA retains approval/disapproval oversight, but delegates to the states the election and designation of specific water bodies as Exceptional State Waters.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

This proposed amendment is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designation met the eligibility requirements which a water body must meet before it can be afforded the extra point source protection provided by such a designation. The Exceptional State Waters category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. Once designated, the Antidegradation Policy

provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The amendments to the Antidegradation Policy of the Water Quality Standards would designate four tributaries to tributaries to Simpson Creek as Exceptional State Waters (9 VAC 25-260-30.A.3.c). These tributaries are Blue Suck Branch in Alleghany and Botetourt County and Downey Branch, Piney Mountain Branch, and the North Branch Simpson Creek in Alleghany County.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

Upon permanent regulatory designation of a water body as an Exceptional State Water, the quality of that water body will be maintained and protected by not allowing any degradation except on a very short-term basis. No new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated. In addition, no new mixing zones would be allowed in Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Waters sections.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment. However, the only riparian landowner for each of these waters is a federal agency (US Forest Service) and none of these waters contain any permitted point source discharges nor are any anticipated by the applicable federal agencies.

The primary advantage to the public is that these waters will be protected at their present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities exceptional aquatic communities are described in the Department's revised April 25, 2001 "Guidance and/or Exceptional Surface Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3). Although all of these waters proposed for designation are located on public (federal) land, those localities and businesses located near the designated waters may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that lead to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of these amendments.

Requirements More Restrictive Than Federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

The proposed amendments do not exceed applicable federal minimum requirements.

Locality Particularly Affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

Alleghany County, Botetourt County

Public Participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and on any impacts of the regulation on farm and forest land preservation. Also, the Board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

The Board also seeks comment on whether the eligibility decision criteria for Exceptional State Water designation are met of each of these waters and whether the upper and lower boundary designations are appropriately delineated for each water body.

Anyone wishing to submit written comments for the public comment file may do so at the public hearing or by mail, email or fax to Jean W. Gregory, Office of Water Quality Programs, Department of Environmental Quality, P.O. Box 10009, Richmond, VA 23240, (804) 698-4113, by fax to (804) 698-4522 , or e-mail jwgregory@deq.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by 5:00 p.m. on the date established as the close of the comment period.

A public hearing will be held and notice of the public hearing can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</p>	<p>The projected cost to implement and enforce the proposed regulatory amendments should not cause any additional financial impact to the state. These amendments are updates of existing rules and while the staff may have to change the way permit issuance and water quality assessments are conducted, it will not take additional staff or resources to do this. These programs are funded by EPA 106 grants.</p>
<p>Projected cost of the regulation on localities</p>	<p>It is not expected that these Exceptional State Waters designations will impose a cost on the localities, as these waters are all located on federal lands.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the regulation</p>	<p>Riparian landowners adjacent to the designated water bodies. For this rulemaking, the United States Forest Service is the only identified landowner. No small business is impacted.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>1</p>
<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>None, unless the alternative to discharging to the designated water body requires some additional financial expenditure.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

In compliance with the State Water Control Board’s Public Participation Guidelines (9 VAC 25-10-20 C), the Department will consider all alternatives which are considered to be less burdensome and less intrusive for achieving the essential purpose of the amendment, and any other alternatives presented during the proposed rulemaking.

The primary alternative considered to date was to leave the regulation unchanged. This was not the alternative chosen because these four water bodies met the eligibility criteria, based on the information available at the time of the preliminary evaluation.

Regulatory Flexibility Analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The water bodies proposed for designation are on federal (US Forest Service) land and there are no small businesses identified that would be impacted.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

The comment period for this Notice of Intended Regulatory Action ended on November 15, 2004. Below is a summary of public comments received during that comment period.

Commenter	Comment
Bath County Board of Supervisors	Reiterated their opposition as detailed in a resolution adopted by the county board December 9, 2003. The county’s position remains the same despite the change in boundaries for the Cowpasture River and Simpson Creek intended for regulatory action. Their reasons for opposition are as follows: 1. A Tier III designation would be detrimental to accommodating important economic and social development in the area where the Cowpasture River is located and would adversely impact the rights of communities to plan for and control future growth due to state and federal government intervention and control through strict

<p>Allegheny County Board of Supervisors</p>	<p>statutory and regulatory requirements.</p> <ol style="list-style-type: none"> 2. The cost of complying with a Tier III designation will place an undue hardship on tax payers. 3. Continued government interference in the culture and heritage of the citizens of the area will cause drastic change that is not necessary or warranted. 4. A Tier III designation is not in compliance with the county's Comprehensive Plan. <p>Adopted a resolution on October 22, 2004 to oppose Tier III designation of the Cowpasture River and Simpson Creek and stated that a Tier III designation would be in conflict with the county's Comprehensive Plan and limit economic growth. The Allegheny County Planning Commission fully supports the Allegheny County Board of Supervisors resolution to <u>not</u> support the proposed Tier III designation of the Cowpasture River and Simpson Creek.</p>
<p>Highland County Board of Supervisors</p>	<p>Supports the resolution of opposition adopted by Bath County and stated their belief that a Tier III designation could have significant impact on the local governments and would be detrimental to future development. Highland County is located upriver of the segment being considered for regulatory action.</p>
<p>SELC</p>	<p>Katherine Slaughter and Sarah Francisco provided comment on behalf of the Southern Environmental Law Center (SELC) in full support of the designation. They stated that the Cowpasture River meets all eligibility criteria to be considered for designation. They stated that the river has been included by National Geographic in their list of "Great Rivers of the World", has extremely rich and diverse aquatic communities, and is home to two state threatened fish species. As one of the few truly pristine water bodies in the state, the Cowpasture River needs to be preserved and protected for future generations. SELC realizes that the proposed designation has been controversial but they do not think that controversy should be an excuse to not designate the Cowpasture River as Tier III.</p>
<p>George Keller</p>	<p>The following 17 individuals spoke at the November 10, 2004 public meeting in opposition: Richard Byrd, Wesley Dew, Richard Engleman, Wanda Engleman, Danny Goodbar, Benjamin Hicks, Eric M. Hostetter, George Keller, Robert Marshall, Judi McCoy, Dave Newkirk, Cletus Nicely, Sidney Nicely, Jackie Plecker, Robert G. Reynolds, S.E. Shannon, Stuart Shawn</p>
<p>Judi McCoy</p>	<p>The vice chairman of the Allegheny County Planning Commission represented the commission in opposition. Due to the initiating of the notice of intended regulatory action, he is not sure Allegheny County's actions and decisions had been presented to the SWCB.</p>
<p>Dave Newkirk</p>	<p>Spoke on behalf of Friends of the Cowpasture River and stated that the organization she represents is committed to protecting the river but is opposed to the designation due to concerns over potential loss of landowner rights and unnecessary state and federal government interference and regulation at the local level.</p>
<p>Cletus Nicely, Allegheny Board of Supervisors</p>	<p>Spoke as a representative of the county Board of Supervisors. He stated that the county is opposed and he urged the SWCB members to vote against the designation of the Cowpasture River and Simpson Creek.</p>
<p>S.E. Shannon</p>	<p>Stated that if the Cowpasture is going to have a Tier III designation, it should be the</p>

<p>Mary Gray</p>	<p>entire river and all tributaries. It is his opinion that the Tier 3 effort should be dropped and maintained at Tier 2.</p> <p>Inquired whether the SWCB members would receive comments made at the public meeting and how would citizens find out the outcome of the Board's decision regarding the intended regulatory action.</p> <p>The following 15 individuals spoke at the November 10, 2004 public meeting in support: Ellen Ford, Kent Ford, Jimmie Houff , Patrick Iarossi, Michael Jamison, Diana Kling-Smith, Jean H. Manner, John M. Manner, Jr., Fred Paxton, Betty Jo Rhodes, Keven Rice, Louis Robinson, Jennifer Walton, Michael Whiteside, Roy W. Wright.</p>
<p>Fred Paxton</p>	<p>Spoke on behalf of Cowpasture River Preservation Association (the petitioning organization) in support and stated that the Cowpasture River and Simpson Creek are deserving of Tier III designation and that such a designation is an excellent mechanism to preserve their beauty and water quality. He stated that it would be beneficial to utilize a participatory approach with the formation of an ad hoc advisory committee comprised of all interested parties to finalize a proposal.</p>
<p>Roy Wright</p>	<p>Spoke in support and stated that any questions he may have previously had regarding potential impacts of a Tier III designation had been adequately answered. He questioned the motives individuals that perpetuated untrue rumors within the locality. Without Tier III protection, treated sewage could be discharged to the river and that is an environment in which he does not want his grandchildren to swim. He stated that the government has assumed the responsibility to clean up polluted waters and then posed the question of "Why not protect the unpolluted ones now before they become like the Chesapeake Bay or Jackson River?"</p>
<p>James C. Bay, IV</p>	<p>Spoke at the public meeting to ask questions but provided no comment at that time supporting or opposing the designation. He said he would later provided written comment.</p> <p>Staff received signed petitions supporting the nomination. Discounting signatures by those citizens that also sent letters of support, the total number of signatures of citizens supporting the designation was 354 of which 61 (17%) are riparian landowners. Staff also received 95 letters in support of which 44 (46%) were sent by riparian landowners and 124 letters in opposition of which 30 (24%) were sent by riparian landowners.</p> <p>The total number of responses by letter, email, and petition signatures (riparian + non-riparian landowners) was 573. Of those 573 responses, 449 (78%) were in support and 124 (22%) were in opposition. The total number of responses by letter, email, and petition signatures from riparian landowners was 135. Of those riparian landowners, 105 (78%) were in support and 30 (22%) were in opposition.</p> <p>The majority of the citizens in support of the designation stated that a Tier III designation is an effective tool for preserving the water bodies' current outstanding qualities for future generations and now is an excellent opportunity to do so. They also state their assurance that a Tier III designation will not affect property rights or require additional governmental layers of regulation, nor will it adversely affect agricultural and forestry practices. In addition, they also believe that protecting the water quality of the Cowpasture River and Simpson Creek will serve as an economic enhancement for the area by stimulating eco-tourism and outdoor oriented recreation.</p>

	<p>The majority of those citizens opposed to the designation stated their belief that Tier II adequately protects the Cowpasture River and Simpson Creek and that additional government interference and regulation is unnecessary and unwanted. Most stated that they, as citizens and/or riparian landowners, do a good job of protecting and preserving the beauty and cleanliness of the Cowpasture River and Simpson Creek and also wish to protect their personal property rights. Some concerns were voiced regarding the possibility of more restrictive and potentially economically deleterious restrictions and/or requirements on farming and forestry practices. They also stated concerns over possible expansion of state and federal jurisdictions and controls and the potential for new or changed regulations and restrictions. Some suggestions were made to develop a citizen/landowner group with backup monitoring resources to oversee water quality within the Cowpasture River and Simpson Creek as a preferable alternative to unwanted governmental regulation.</p>
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AGENCY RESPONSE: The agency response to the public comments is that the Cowpasture River and Simpson Creek are no longer being considered for Exceptional State Waters designation. Instead, staff is proceeding with regulatory designation of four tributaries to Simpson Creek and has determined that the waters proposed for designation meet the required eligibility criteria necessary for consideration as Exceptional State Waters and, to the best determination of agency staff, are wholly located on publicly owned land.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
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<p>9 VAC 25-260-30</p>	<p>N/A</p>	<p>(1) Little Stony Creek in Giles County from the first footbridge above the Cascades picnic area, upstream to the 3,300-foot elevation.</p> <p>(2) Bottom Creek in Montgomery County and Roanoke County from Route 669 (Patterson Drive) downstream to the last property boundary of the Nature Conservancy on the southern side of the creek.</p> <p>(3) Lake Drummond, located on U.S. Fish and Wildlife Service property, is nominated in its entirety within the cities of Chesapeake and Suffolk excluding any ditches and/or tributaries.</p> <p>(4) North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters.</p> <p>(5) Brown Mountain Creek, located on U.S. Forest Service land in Amherst County, from the City of Lynchburg property boundary upstream to the first crossing with the national forest property boundary.</p> <p>(6) Laurel Fork, located on U.S. Forest Service land in Highland County, from the national forest property boundary below Route 642 downstream to the Virginia/West Virginia state line.</p> <p>(7) North Fork of the Buffalo River, located on U.S. Forest Service land in Amherst County, from its confluence with Rocky Branch upstream to its headwaters.</p> <p>(8) Pedlar River, located on U.S. Forest Service land in Amherst County, from where the river crosses FR 39 upstream to the first crossing with the national forest property boundary.</p> <p>(9) Ramseys Draft, located on U.S. Forest Service land in Augusta County, from its headwaters (which includes Right and Left Prong Ramseys Draft) downstream to the Wilderness Area boundary.</p> <p>(10) Whitetop Laurel Creek, located on U.S. Forest Service land in Washington County, from the national forest boundary immediately upstream</p>	<p>The addition of four water bodies to 9 VAC 25-260-30.A.3.c. These waters meet the eligibility criteria necessary to be designated as Exceptional State Waters.</p>
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		<p>from the second railroad trestle crossing the creek above Taylors Valley upstream to the confluence of Green Cove Creek.</p> <p>(11) Ragged Island Creek in Isle of Wight County from its confluence with the James River at a line drawn across the creek mouth at N36°56.306'/W76°29.136' to N36°55.469'/W76°29.802' upstream to a line drawn across the main stem of the creek at N36°57.094'/W76°30.473' to N36°57.113'/W76°30.434', excluding wetlands and impounded areas and including only those tributaries completely contained within the Ragged Island Creek Wildlife Management Area on the northeastern side of the creek.</p> <p>(12) (Reserved)</p> <p>(13) (Reserved)</p> <p>(14) (Reserved)</p> <p>(15) (Reserved)</p> <p>(16) (Reserved)</p> <p>(17) (Reserved)</p> <p>(18) (Reserved)</p>	
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In 9 VAC 25-260-30 the following amendments are proposed under 9 VAC 25-260-30.A.3.c:

- (19) Blue Suck Branch from its headwaters downstream to the first crossing with the George Washington National Forest boundary.
- (20) Downy Branch from its headwaters downstream to the first crossing with the George Washington National Forest boundary.
- (21) Piney Mountain Branch from its headwaters downstream to the first crossing with the George Washington National Forest boundary.
- (22) North Branch Simpson Creek (Brushy Run) from its headwaters downstream to its confluence with Simpson Creek.